

ED 6 1 1967
SUPREME COURT, U. S.

No. 416

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

FLORENCE FLAST, ALBERT SHANKER, HELEN D. HENKIN,
FRANK ABRAMS, C. IRVING DWORK, FLORINE LEVIN and
HELEN L. BUTTENWIESER,

Appellants,

against

JOHN W. GARDNER, as Secretary of the Department of
Health, Education and Welfare of the United States,
and HAROLD HOWE, 2D, as Commissioner of Education
of the United States,

Appellees.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF OF UNITED AMERICANS
FOR PUBLIC SCHOOLS**

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FOR PUBLIC SCHOOLS**

United Americans for Public Schools, pursuant to Rules of this Court, respectfully applies to this Court for leave to file its annexed brief as an *amicus curiae* in support of Appellants in the above entitled action, on the following grounds:

1. Amicus Curiae has not been able to obtain consent of the parties herein within the time prescribed for filing briefs for the reason that its counsel, resident in California, was not able to review until now all the briefs on file to ascertain whether there is need for additional commentary. Having reviewed said briefs, it appears that there is such need and that the points raised in the annexed

brief will present additional points not yet raised and that will be helpful to the Court. The special considerations will more fully appear herein.

2. The question presented by the above entitled action is whether the appellants, having sued as federal citizens and taxpayers, assert a legally cognizable injury by alleging in their complaint that Title I and II of the Elementary and Secondary Education Act of 1965 authorizes, or is being applied to grant, support for religious establishments in contravention of the establishment and free exercise clauses of the First Amendment of the United States Constitution.

3. Interest of United Americans for Public Schools.

United Americans for Public Schools (formerly Californians for Public Schools) is a California non-profit corporation, formed in 1953 and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California with special reference to the public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members and to the public related and objective and educational facts and findings, with the object of preserving the purposes of public schools and of the said constitutions, and fostering adherence thereto and support thereof.

Its members, as citizens and taxpayers of the United States and of the State of California, are vitally concerned both personally and economically in the issues of the instant case. California, the most populous State in the Union, like the State of New York, the second most populous State, whose educational programs are here involved, has specific State Constitutional provisions prohibiting the use of public funds for the support of sectarian or denominational schools. *Calif. Const.*, Art. IX, Sec. 8; Art. IV, Sec. 30. Despite such constitutional prohibitions, and like New York, the State of California accepts on behalf of its citizens millions of dollars in fed-

eral aid to education, including aid to schools authorized under Title I and II of the Elementary and Secondary Education Act of 1965, the statute here involved. Like New York, under the statute (20 U.S.C. §§ 241 e and 822 (a) (2) and 822(a) (3)) and rules and regulations promulgated by the Department of Health, Education and Welfare, receipt of such aid for public schools is conditioned first, upon administration of the act by state-supported agencies, and second, upon equal participation in said aid by private, parochial and sectarian schools.

But, unless the judgment below be reversed and the rule of *Frothingham v. Mellon* (262 U.S. 447) be rejected or held inapplicable in at least this type of case, members of amicus curiae are, like the New York plaintiffs, entangled in an absurd anomaly. In order to pursue, as representatives of many California citizens, their federal constitutional rights under the First Amendment (much less their rights under the State Constitution), these members would be compelled to sue in the State Court to enjoin the appropriate state agency from channeling federal funds into sectarian schools. (Such a suit has been authorized and prepared, but not filed, by amicus curiae.) Should they prevail, theirs may be a hollow victory. Once the State were thus to deny to the private, sectarian schools these federal funds, the millions earmarked for their State's public schools might perforce be cut off by the Department of Health, Education and Welfare. Consequently, these citizen-taxpayers face an intolerable option. Either they forego enforcement of their personal, "preferred" constitutional rights under the First Amendment and their State Constitution, and thereby permit their State and Federal government thus to conspire to evade the general prohibitions of the First Amendment and the specific prohibitions in their State Constitution, or they deliberately create either second-class state public education or else increased state taxation to bring their State's public school system up to its prior, federally-financed standards, and all the meanwhile continuing to

bear without remedy their burden as federal taxpayers of federally-financed education in private, sectarian schools in other states, and all this, despite the adjudication that not only their personal State but their personal First Amendment rights are thus violated. Such an outrageous squeeze could hardly have been sanctioned by the Founding Fathers!

4. Reasons for submission of brief.

Movant has reason to believe that some vital questions of law, relevant to the issues herein, have not been fully covered therein. These include elaboration upon the economic interest of plaintiffs which give them standing to sue, and upon the implied overruling of the rule of *Frothingham v. Mellon*, in this type of civil liberty suit, and upon the doctrine of unconstitutional conditions.

It has not been feasible to present the instant motion at an earlier date due to the necessity for first determining the proposed arguments of all the parties.

It is respectfully requested on the above grounds that this application for leave to file a brief as *amicus curiae* be granted.

Respectfully submitted,

UNITED AMERICANS FOR PUBLIC SCHOOLS

By

HENRY C. CLAUSEN
Attorney for Movant,
February 21, 1968.

BRIEF

INTEREST OF THE AMICUS CURIAE

United Americans for Public Schools (formerly Californians for Public Schools) is a California non-profit corporation, formed in 1953 and operating since then to investigate, discuss and study governmental affairs in the United States of America and in the State of California with special reference to public schools and the Constitution of the United States and the Constitution of the State of California, and to disseminate to its members and to the public related and objective and educational facts and findings, with the object of preserving the purposes of public schools and of the said constitutions, and fostering adherence thereto and support thereof.

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But, unless the judgment below be reversed and the rule of *Frothingham v. Mellon*, (262 U.S. 447) be rejected or held inapplicable in at least this type of case, members of amicus curiae are, like the New York plaintiffs, entangled in an absurd anomaly. In order to pursue, as representatives of many California citizens, their *federal* constitutional rights under the First Amendment (much less their rights under the State Constitution), these members would be compelled to sue in the *State* Court to enjoin the appropriate *state* agency from channeling *federal* funds into sectarian schools. (Such a suit has been authorized and prepared, but not filed, by amicus curiae.) Should they prevail, theirs may be a hollow victory. Once the State were thus to deny to the private, sectarian schools these federal funds, the millions earmarked for their State's public schools might perforce but cut off by the Department of Health, Education and Welfare. Consequently, these citizen-taxpayers face an intolerable option. Either they forego enforcement of their personal, "preferred" constitutional rights under the First Amendment and their State Constitution, and thereby permit their state and the federal government thus to conspire to evade the general prohibitions of the First Amendment and the specific prohibitions in their State Constitution, or they deliberately create either second-class state public education or else increased state taxation to bring their state's public school system up to its prior, federally-financed standards, and all the meanwhile continuing to bear without remedy their burden as federal taxpayers of federally-financed education in private, sectarian schools in other states, and all this, despite the adjudication that not only their personal State but their personal First Amendment rights are thus violated. Such an outrageous squeeze could hardly have been sanctioned by the Founding Fathers!

STATUTE INVOLVED

The statutory provisions involved in this suit are Title I and II of the Elementary and Secondary Education Act of 1965.

QUESTION PRESENTED

Does plaintiffs' complaint pose a case or controversy within the purview of Article III of the Constitution of the United States?

STATEMENT OF THE CASE

Plaintiffs below, citizens and taxpayers of the United States and residents of the State of New York, filed their complaint to enjoin the use of federal funds to finance guidance services and instruction in reading, arithmetic and other subjects in religiously operated schools and to prevent the purchase of textbooks and other instructional material therefor, all as authorized by Title I and II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. Secs. 241(a)-241(l), 821-827. Plaintiffs challenged the constitutionality of said statute upon the grounds that they were being forced to be unwilling contributors to the support of church schools, in contravention of both the "establishment" and "free exercise" clauses of the First Amendment of the United States Constitution.

The District Court, in a two-to-one decision, dismissed the complaint, holding that plaintiffs could have had standing to sue only because they pay income taxes, and holding, under the authority of *Frothingham v. Mellon*, 262 U.S. 447, that the allegation of such taxpayer's interest could pose no "case or controversy" cognizable under Article III of the United States Constitution.

SUMMARY OF ARGUMENT

The Court below erred in holding that only plaintiffs' interests in the federal treasury by reason of payment of income taxes could give them standing to sue and that such interests were by nature *de minimis*, for several reasons.

First, considered solely as a judicially-noticed matter of economics, such interests are not *de minimis*. As representatives of many other New York taxpayers in the second most populous state, their combined representative fractional interest in the federal treasury is substantial and comes not merely from income tax payments but from payment of federal excise taxes and from indirect payment of a myriad of federal taxes through the correspondingly increased costs of goods and services they purchase.

Second, and more important, plaintiffs allege that their right of religious liberty have been infringed, and to force plaintiffs and the citizens they represent to pay any fraction, no matter how small, of their contributions to the federal treasury for the support of religious schools contravenes well-established constitutional principals of the separation of Church and State. The *de minimis* argument should have no application relative to enforcement of such liberties guaranteed by the First Amendment.

Third, as representative citizens of the State of New York, plaintiffs have a compelling economic interest in the support of their public school system. They each have a *measurable* interest in the amount of federal aid appropriated for their public school system. And beyond such an economic interest, they each individually have a personal interest in their rights guaranteed under their State and Federal Constitutions, in their *personal* rights to the free exercise of religion, and in their freedom from being compelled to support any religious school. Since federal aid to the New York school system is con-

ditioned, under the statute attacked, unconstitutionally, upon the payment of public funds to sectarian schools, payment being made by state-supported agencies, they perforce must petition this forum to cure their grievances. Otherwise, they have no adequate remedy, the right to which is also guaranteed by the First Amendment.

And finally, the reasons enunciated by this Court to support its holding in the *Frothingham* case do not apply here. Therefore, the reasons for the rule ceasing, the rule ceases, a conclusion borne out by other, analogous cases of this Court which impliedly hold that in the protected area of civil liberties, a citizen-suit like the one below is a cognizable case or controversy.

ARGUMENT

Preliminary

In view of the many decisions and their many concurring and dissenting opinions in the field of Separation of Church and State, and, indeed, in view of the recent furor aroused in plaintiffs' State over the abortive attempt to repeal the mis-named Blaine Amendment, one can hardly imagine a more controversial "controversy" than the issue posed by plaintiffs' complaint. And that is precisely the issue before this Court—is this a "case or controversy" cognizable under Article III of the Constitution of the United States. Amicus contends it is, and clearly so.

I. Plaintiffs, as Taxpayers, Have Sufficient Economic Stake in the Outcome of This Case to Give Them Standing to Sue.

Initially, amicus takes issue with the District Court's holding that plaintiffs could have standing to sue only because they pay income taxes, and that there is no measurable trace thereof in the federal treasury which finds its way into the unconstitutional appropriations, and hence

plaintiffs suffer no pocketbook damage. This is a rationale used by this Court in enunciating the rule in *Frothingham v. Mellon*, 262 U.S. 447, and the other cases cited by the District Court.

Amicus contends that perhaps this may have been so in the 1920's when *Frothingham* was decided, but it hardly fits this case at this time. It hardly fits the taxes, the tax rates and the economics of the 1960's. Presently applied, the rationale is wrong for two fundamental reasons.

First, plaintiffs sue not only in their own behalf but in behalf of other New York taxpayers similarly situated. Since they are citizens of the second most populous State in the Union, their combined income tax payments are substantial. Judging by the defeat on November 7, 1967 of a proposed new State Constitution, which attempted to eliminate a denial of public funds for non-public sectarian schools, it may well be that they represent three-fourths of the New York electorate. Furthermore, plaintiffs and those they represent pay excise taxes. And even more, plaintiffs and those they represent (as this Court perforce must judicially notice), pay myriad more hidden income and excise taxes indirectly by absorbing other persons' taxes through correspondingly increased costs of commodities and services they purchase. This is real pocketbook damage! In combination, all these payments certainly can be arithmetically computed to be a sizeable percentage of governmental income, and hence outgo.

Second, plaintiffs and those they represent have a measurable interest in the funds their State receives in federal aid for their public school system. But the statute under attack in 20 U.S.C. Secs. 241 (e) and 822 (a) (2) and 823 (a) (2) conditions receipt of federal aid for their public schools upon the State's undertaking to channel equal federal benefits to private, sectarian schools through State-supported agencies. These, we would contend on

the merits, are clearly unconstitutional conditions under both plaintiffs' State as well as under Federal Constitutions. As this Court recently held in *Sherbert v. Verner*, 374 U.S. 398, at page 404:

"It is too late in the day to doubt that the liberties of religion . . . may be infringed by the denial of or placing of conditions upon a benefit or privilege."

See also Note, "Unconstitutional Conditions," 73 Harv. L. Rev. 1595, et seq. Assuming so, New York State therefore is illegally transferring public funds to sectarian schools in sums certain, which sums should go only to public schools. The loss to the public schools of public funds so transferred is a *measurable* amount, in which plaintiffs, as New York taxpayers, have a *measurable* interest. Furthermore, were plaintiffs to pursue their State Court remedies to halt this unconstitutional transfer within their own State, the federal government, by operation of the statute and rules and regulations passed thereunder, would halt the flow of federal millions to public school aid. This is an additional economic interest which plaintiffs would pursue by seeking redress in the federal courts. And, were plaintiffs denied such a federal forum, as held below, and failed, for obvious reasons, to insist upon their constitutional rights, they would in effect be bargaining away these rights in exchange for a certain amount of federal millions; again a *measurable* economic interest.

But, finally, amicus contends that it matters little in terms of principle how much of plaintiffs' tax-bite goes to support sectarian schools. The First Clause of the First Amendment was not intended by the Founding Fathers to be conditioned in its enforcement upon the size of an unconstitutional levy. As Madison stated in his "Memorial and Remonstrance Against Religious Assessments", quoted by Justice Rutledge in *Everson v. Board of Education*, 330 U.S., at 65-66:

"Who does not see that the same authority which can establish Christianity, in exclusion of all other religions may establish with the same ease any particular sect of Christians, in exclusions of all other Sects. That the same authority which can force a citizen to contribute *three pence only* of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." (Emphasis Added.)

Thus, plaintiffs' rights under the First Amendment should not have a price tag. They are personal rights, which, when infringed by even an unmeasurable levy, still may be enforced in the federal courts.

II. Because Plaintiffs' Rights Under the First Clause of the First Amendment are Preferred, Personal Civil Rights Having Incalculable Value, Plaintiffs' Allegations That They Have Been Violated and That Plaintiffs Were and Are Damaged Thereby Suffice to Vest the Federal Court With Jurisdiction Under Article III.

Can there be any doubt that the duty devolves upon this Court to guard jealously "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment"? *Thomas v. Collins*, 323 U.S. 516, at 530. How then can the Court shirk this duty by its own self-made *Frothingham* rule? It is just not intellectually honest to perpetuate a rule which immunizes Congressional appropriations and also restrains the Court from striking down public appropriations which violate these indispensable freedoms. Such an anomalous result is not the rational construction to which the Fundamental Law is entitled. Nor is it consistent with the First Amendment itself. Where else but to this Court may citizens like plaintiffs effectively petition for redress of their civil right grievances, rights expressly guaranteed in the First Amendment? *Brotherhood etc. v. Virginia, ex rel Virginia State Bar*, 377 U.S. 1. Every right must have its remedy, and most especially, a constitutional right!

The fact is, however, that this Court has not shirked this duty in the area of such civil rights. Its decisions perforce impliedly suggest that plaintiffs do have standing to sue.

A. *The Frothingham Rule Does Not Apply to This Type of Citizen-Suit.*

The closest analogous cases amicus has found are the *Griffin* cases, *Griffin v. State Board*, 239 F. Supp. 560, *Griffin v. School Board*, 377 U.S. 218, and *Griffin v. Board of Supervisors*, 339 Fed. 2d 486. Each involved State appropriations to private schools that were designed to perpetuate school segregation. These various courts found the plaintiff there to have standing to sue "without question". In *Doremus v. Board of Education*, 342 U.S. 429, the Court applied the *Frothingham* rule, but expressly stated at page 431, "It is not charged that the practice required by the statute conflicts with the convictions of either mother or daughter." Why note the absence of such an allegation unless its presence would have given plaintiffs standing to sue? And where in *Engel v. Vitale*, 370 U.S. 421, or *School District of Abington v. Schempp*, 374 U.S. 203 is the direct, out-of-pocket injury? In truth, this last factor which the Court below held to be so determinative, is no longer a prerequisite to a suit to protect the preferred civil rights guaranteed by the First Amendment.

B. *The Reasons for the Frothingham Rule Do Not Apply to This Type of Case; Hence the Rule Should Not Apply.*

In *Frothingham v. Mellon*, 262 U.S. 447, the plaintiff brought suit as a taxpayer, alleging that by reason of a Congressional appropriation for maternal welfare, her future taxation would be increased and thereby her property would be taken without due process of law. The Court held that her complaint presented no issue, inasmuch as she suffered or was threatened with no direct in-

jury. Aside from the obvious distinctions that the case involved threatened "future" taxation and property rights under the due process clause, and not, as here, present taxation and not the preferred civil rights of the First Amendment, the reasons advanced in the opinion to support the *Frothingham* decision clearly have no applicability to our case.

First, the Court was concerned with the possible inconvenience to the Courts because a large number of appropriations otherwise could be thus attacked. Amicus submits that inconvenience would be no excuse for failure of the Court to enforce upon Congress the express limitations imposed upon it by the First Amendment, and indeed, in other fields, the Court willingly has assumed to honor and exercise this duty. Furthermore, the likelihood is small that a majority of Senators and Congressmen would in a multitude of instances violate, as they have here, the clear injunction, "Congress shall make no law . . ."

Second, the Court held that the taxpayer's interest in the moneys of the treasury was comparatively minute and indeterminable and was shared with millions, and his interest in future appropriations too remote and uncertain to appeal to the preventive powers of a court of equity. But the opposite is true here. Plaintiffs in their representative capacity represent millions of taxpayers. Furthermore, we are concerned with funds already appropriated, and with determinable, measurable sums, all as hereinbefore set forth. And finally, we contend it makes little difference however small may be plaintiffs' contributions to such appropriations, or whether, indeed, after a tracing it be found that they contribute none, and the slack be taken up by others. The First Amendment would condemn even a "three pence" contribution, by anyone.

Third, the Court invoked the doctrine of separation of powers, contending that the Court's power amounted

to "little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of enforcement of a legal right." (P. 488) But enforcement of "a legal right" is precisely what plaintiffs seek below. They have the legal, personal right, under both the Federal and their State Constitutions, to refuse to support sectarian schools with public funds, to compel their State-supported agencies to refuse to channel public funds to support sectarian schools, and to compel Congress to abide by the mandate to "make no law respecting the establishment of religion, or prohibiting the free exercise thereof", and, to promote the excellence of their public school system by receiving the benefits of federal public funds without the imposition upon such benefit of an unconstitutional condition as in *Sherbert v. Verner*, 374 U.S. 398, 404.

Because the reasons for the *Frothingham* rule no longer apply in this day of high taxes, great concern for public education, and enforcement of civil rights, the rule should no longer apply and should be swept away to join other dusty precedents long since discarded by this modern Court.

CONCLUSION

For the reasons foregoing, it is respectfully submitted that the order of the United States District Court for the Southern District of New York should be reversed and the case returned to the lower court for reconsideration on the merits.

Respectfully submitted,

HENRY C. CLAUSEN

Attorney for Amicus Curiae